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22-ORD-203

October 7, 2022

In re: Phillip Hamm/McCracken County Sheriff's Office

Summary: The McCracken County Sheriff's Office (the "Sheriff's Office") did not violate the Open Records Act ("the Act") when it denied a request for a record that is exempt from inspection under KRS 17.150(2). However, the Sheriff's Office failed to carry its burden of proof that it timely responded to the request.

Open Records Decision

On July 13, 2022, Phillip Hamm ("Appellant") submitted a request to the Sheriff's Office to inspect, in-person, a recorded interview of a specific person that was conducted on a specific date. The Appellant claimed that he is mentioned by name in the recorded interview and is therefore entitled to inspect it. On July 21, 2022, the Sheriff's Office denied the request under KRS 17.150(2) and KRS 61.878(1)(h). This appeal followed.

The Appellant alleged the Sheriff's Office's response violated the Act because he claims it was issued untimely.[1] Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or

[1] The Appellant also claimed the Sheriff's Office violated the Act because its timely response was not issued by the official records custodian. However, a public agency's response to a request under the Act "shall be issued by the official custodian *or under his or her authority*, and it shall constitute final agency action." KRS 61.880(1) (emphasis added). Thus, the Sheriff's Office is allowed, under the Act, to have the McCracken County Attorney issue its response to the Appellant's request. Furthermore, the Sheriff's Office has not claimed that the McCracken County Attorney does not have authority to respond on its behalf to the Appellant's request. *See, e.g.,* 21-ORD-177 n.1. (agency response issued by its attorney is not a violation of the Act).

deny the request and explain why.[2] KRS 61.880(1). Moreover, a public agency carries the burden of proof to sustain its action, including its assertion to have responded timely to a request. KRS 61.880(2)(c).

Here, the Appellant submitted the request on July 13, 2022, but it is not clear when the Sheriff's Office received it. In its response on July 21, the Sheriff's Office stated only that it had "received" the request, but not the day on which it was received. As previously stated, a public agency has five business days from *receipt* of the request to respond. KRS 61.880(1). And under KRS 446.030(1)(a), when "computing any period of time prescribed . . . by any applicable statute . . . the day of the act, event or default after which the designated period of time begins to run is not to be included." *See also* 22-ORD-133 n.1. Thus, if the Sheriff's Office received the request the same day it was submitted, July 13, its response would have been due on July 20.[3] But if the Sheriff's Office did not receive the request until July 14, then its response on July 21 would have been timely. The Office cannot assume when the Sheriff's Office received the request, as it is the Sheriff's Office's burden to sustain its actions. KRS 61.880(2)(c). Yet here, the Sheriff's Office never stated when it actually received the request. Accordingly, the Sheriff's Office failed to carry its burden that its response was timely.

In its response, the Sheriff's Office relied on both KRS 17.150(2) and KRS 61.878(1)(h) to deny the Appellant's request and withhold the requested record. This Office has previously explained the difference between KRS 17.150(2) and KRS 61.878(1)(h). *See*, *e.g.,* 21-ORD-098. KRS 61.878(1)(h) exempts "records of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action." When an agency relies on KRS 61.878(1)(h) to deny a request, it must articulate "a concrete risk of harm" that will affect the law enforcement investigation. *See City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013)

Under KRS 17.150(2), however, "intelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made." If a law enforcement

[2] Since the Sheriff's Office did not respond to the notice of appeal issued by this Office, it is unknown what day it actually received the Appellant's request.
[3] July 16 was a Saturday and July 17 was a Sunday.

agency denies access to a record under KRS 17.150(2), it must "justify the refusal with specificity." KRS 17.150(3).

Here, it is undisputed that the Sheriff's Office is a law enforcement agency under KRS 17.150(2). Moreover, this Office has found that the term "intelligence and investigative reports" includes audio recordings. *See, e.g.,* 22-ORD-127. The Sheriff's Office claims that the record contains information that is to be used in a prospective law enforcement action. The Office has found that a law enforcement agency can satisfy the KRS 17.150(3) requirements by stating a specific reason for withholding a requested record pursuant to KRS 17.150(2). *See e.g.,* 18-ORD-222. More recently, this Office has found that a law enforcement agency can satisfy KRS 17.150(3) by giving specific information that explains that the criminal prosecution is ongoing or has not been declined. *See, e.g.,* 22-ORD-127.

Here, the Sheriff's Office explained that this record relates to an ongoing criminal investigation and that the record contains information being used by the prosecution to determine what the final disposition of the case will be or to prepare for trial if one is necessary. The Sheriff's Office further explained with specificity that the "witness's recollections would be tainted if they learned information regarding the investigation" contained in the record if it were to be released and that "their testimony could be subject to challenge when the matter goes to trial." Furthermore, the Sheriff's Office explained that the "disclosure [of this record] would prejudice the interests of the criminal justice system's uniform operation by permitting inspection beyond the scope of which such information may be discovered under Kentucky's rules of criminal procedure [*sic*]."[4]

However, the Appellant cites KRS 61.884 and claims he is entitled to the record because the recording mentions him by name. "Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, *subject to the provisions of KRS 61.878*." KRS 61.884 (emphasis added). Thus, a requester is not entitled to inspect records pertaining to him if the records are exempt from inspection under one of the exemptions listed in KRS 61.878. *See, e.g.,* 22-ORD-059 (denial of records that pertained to criminal litigation where the requester was the defendant under KRS 61.878(1)(h) upheld). And as previously discussed, the audio recording is currently exempt from inspection

[4] Under these facts it is not clear whether the Appellant is a defendant in any related criminal litigation, but this Office has previously noted that "[t]he Kentucky Rules of Criminal Procedure govern a criminal defendant's right to obtain pretrial discovery" not the Act. *See*, RCr 7.24; 22-ORD-059 n.1.

under KRS 17.150(2). KRS 17.150(2) is incorporated into the Act under KRS 61.878(1)(l), which exempts records that are made confidential by another statute. Thus, it is irrelevant that the requested recording makes a specific reference to the Appellant, because the recording is "subject to the provisions of KRS 61.878," specifically, KRS 61.878(1)(l). KRS 61.884. Accordingly, the Sheriff's Office did not violate the Act when it withheld the requested recording.

In sum, the Sheriff's Office failed to carry its burden that it issued a timely response. However, the Sheriff's Office did not violate the Act when it denied records that are exempt from inspection under KRS 17.150(2), incorporated into the Act under KRS 61.878(1)(l). The Appellant is not entitled to inspect records that mention him by name because the records are otherwise exempt from inspection under KRS 61.878.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
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Distributed to:

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